Office - Supreme Court, U. S.
FILED
MAY 14 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1945

No. 1137

R. R. STONE, Trading as STONE TOWING LINE, Charterer *pro hac vice* of Gas Screw Tug "STONE 6",

Petitioner,

vs.

DIAMOND STEAMSHIP TRANSPORTATION CORPORATION and TEXAS GULF SULPHUR COMPANY, INC.,

Respondent.

BRIEF OF DIAMOND STEAMSHIP TRANSPORATION CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL SPEER,
Counsel for Respondent, Diamond Steamship Transportation Corporation.

GEORGE ROUNTREE, JR.,
of Wilmington, N. C.

GERALD J. MCKERNAN,
of New York, N. Y.,
On the Brief.

INDEX

PAGE

STATEMENT OF THE MATTER INVOLVED 1

(A) COLLISION FACTS 2

(B) TRIAL FACTS 3

OUTLINE OF ARGUMENT 4

ARGUMENT IN OPPOSITION TO PETITION:

POINT I.—The petition does not comply with the provisions of United States Supreme Court Rule 38, Sec. 2 5

POINT II.—The Circuit Court of Appeals committed no error in the rulings complained of by petitioner .. 6

(A) The Circuit Court was correct in reviewing and weighing the entire testimony presented in the trial court 6

(B) The Circuit Court of Appeals was correct in holding that there was a presumption of negligence running against the navigator of the *Severance;* and that there was fault in the navigator, exclusive of the presumption . 10

(C) The Circuit Court of Appeals was correct in holding that petitioner was not entitled to limit his liability 12

POINT III.—Authorities urged by petitioner are not in conflict with the decision of the Circuit Court 16

POINT IV.—The petition for writ of certiorari should be denied 22

Table of Citations.

PAGE

Atlee v. Northwestern Union Packet Co., 88 U. S. 619 (21 Wallace 389) 11

Benedict on Admiralty, 6th Ed., Vol. I, p. 292 13
Brooklyn Eastern, etc. v. United States, 287 U. S. 170 . 20

Coryell v. Phipps, 317 U. S. 406 ..... 15, 21

Dynamic, The, 123 Fed. (2d) 999 ..... 16, 18

Ernest H. Meyer, The, 84 Fed. (2d) 496 ..... 7, 19

In re Great Lakes Transit Corporation, 81 F. (2d) 441 15

Jones & Laughlin Steel Corporation v. Vang, 73 Fed. (2d) 88 13

Layne & Bowe. Corporation v. Western Well Works, Inc., 261 U. S. 387, 67 Law Ed. 712 5
Louis Dreyfus, et al. v. Paterson Steamships, 43 Fed. (2d) 824 11

Matheson, et al. v. Norfolk & North American Steam Shipping Co., 76 Fed. (2d) 177 11
Moore v. Sun Printing & Publishing Ass'n, 95 Fed. 487 21

Pate v. Kennedy, 104 N. C. 234 14

Shilling v. Schwitzer-Cummins Co., 142 F. (2d) 82, 83 17

United States v. Crescent Amusement Company, 323 U. S. 173 at 174, 175 17
Uzzle v. Word, 54 N. C. 226 14

Ward v. Thompson, 63 U. S. (22 How.) 330 13
West Eldara, The, 104 Fed. (2d) 670 12
Wilmington Railway Bridge Company v. Franco-Ottoman Shipping Company, 259 Fed. 166 12

Supreme Court of the United States

OCTOBER TERM 1945

R. R. STONE, Trading as STONE TOWING LINE, Charterer *pro hac vice* of Gas Screw Tug "STONE 6",
Petitioner,

vs.

DIAMOND STEAMSHIP TRANSPORTATION CORPORATION and TEXAS GULF SULPHUR COMPANY, INC.,
Respondent.

No. 1137

BRIEF ON BEHALF OF DIAMOND STEAMSHIP TRANSPORTATION CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement of the Matter Involved.

Application for a writ of certiorari has been made by R. R. Stone, doing business as Stone Towing Line, as the alleged charterer of the Tug *Stone 6* to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit, wherein that Court held petitioner liable for loss and damage caused by collision outside of the channel between the Steamer *Severance* and the abutment of a highway bridge and rocks located on the bottom in the Cape Fear River at Wilmington, North Carolina, on November 23, 1940, and denied petitioner's prayer for limitation of liability of said tug. The opinion of the Circuit Court is reported in *The Severance,* 152 Fed. (2) 916.

(A) Collision Facts.

On November 23, 1940, petitioner R. R. Stone, for valuable consideration, undertook to assist and pilot the *Severance* which was loaded with a cargo of sulphur, from her anchorage off Wilmington, North Carolina, up the Cape Fear River to Navassa, North Carolina (H. B. Stone, R. 4, 5). As a part of the contractual services, Stone furnished and supplied a pilot, Captain Dosher, to move the ship up the river and through the bridge, to the dock at Navassa. Dosher was supposed to be "in complete charge of the navigation of the ship, subject, of course, to the orders of the master" (R. 72, 73).

On the morning of November 23, 1940, Dosher boarded the *Severance* and went up on her bridge, and the tug *Stone No. 6,* pursuant to Dosher's orders, made fast with a hawser to the steamer's bow. The weather was clear, tide last of the ebb, with only a slight wind prevailing (Dosher, R. 10, 11).

Dosher told the master of the *Severance* that he had delayed his arrival at the ship in order to move her at the proper state of the tide, and that he had "waited until the tide was right" (Dosher, R. 12). Dosher ordered the ship's anchor heaved up and her engines put ahead, and she then proceeded up the river, with her navigation in complete charge of Dosher (Dosher, R. 20, 129; Hardy, 125).

Shortly after getting under way, Captain Hardy, master of the *Severance,* asked Dosher if it would be all right for him (Hardy) to leave the bridge and have his lunch. Dosher answered, "Yes, go ahead", or words to that effect, and Hardy then went below (Hardy, R. 126).

Cooper, the third mate of the *Severance,* was on the bridge standing by the engine room telegraph to relay any orders from Dosher to engine room, and there was a seaman

at the wheel. Both Cooper and the helmsman were acting solely under orders of Dosher (Cooper, R. 130).

Shortly after the ship turned to the left to proceed up the Northwest Branch of the river at Point Peter, she took a sheer to port, and Dosher ordered her engines full speed astern and helm hard right. The helm order was obeyed by the helmsman and the rudder went hard right promptly (Dosher, R. 28) and Cooper promptly put the telegraph at full astern and could tell by the ship's vibration that the engine room had responded promptly. However, the ship continued sheering to port until her port bow struck the highway bridge fender system and abutment or rocks out of the channel with such force that she promptly sank in the river (Cooper, R. 131; Sherman, R. 185).

(B) Trial Facts.

After fully hearing the case on May 28 and 29, 1944, and after the submission of briefs on behalf of petitioner and respondents, the Honorable I. M. Meekins, United States District Judge for the Eastern District of North Carolina, wrote to John W. Oast, Jr., proctor for petitioner, on November 24, 1944, advising him that he was of the opinion and held that the petitioner was without fault and therefore should be and is exonerated from all liability; and further, that proctor for petitioner was at liberty to present to him for his consideration, a suitable decree embracing Findings of Fact and Conclusions of Law (R. 105, 106). Proctors for respondents received a copy of this letter, which also suggested that proctor for petitioner should send a copy of the proposed decree to each of his adversary proctors.

On the following day, proctor for petitioner wrote to the trial court, acknowledging receipt of the letter, stating that as soon as possible a draft of Findings of Fact, Con-

clusions of Law and Decree would be submitted, and stating that he would send copies to proctors for damage-claimants (R. 106, 107).

On December 4, 1944, proctor for petitioner wrote to the Trial Judge, submitting his Findings of Fact and Conclusions of Law and Final Decree, with copies of the letter and enclosure to all proctors, stating that if the Court desired any changes he would be glad to have them retyped in accordance with the Court's suggestion (R. 107, 108). Thereafter, on December 8, 1944, the trial court wrote to proctor for petitioner, returning two pages of his Findings of Fact and Conclusions of Law for certain minor corrections therein proposed (R. 109). These corrections amounted only to correcting misspelling, adding or changing a few words solely for the sake of clarity and the deletion of an unnecessary paragraph; some of the changes being in the wording of the decree (R. 110-113).

On December 8, 1944, proctor for petitioner telephoned to proctors for respondent and was told that at this time they did not desire to prepare and submit a counter-decree and Findings of Fact (R. 114).

On December 12, 1944, the trial court signed the Findings of Fact, Conclusions of Law and Decree submitted by proctor for the petitioner and mailed same to the U. S. District Court Clerk in Wilmington, and so notified proctors for respondents (R. 115-116), holding petitioner exonerated from all liability and further holding that the collision did not occur with the privity or knowledge of said petitioner (R. 115).

Outline of Argument.

(1) The petition does not comply with the provisions of United States Supreme Court Rule 38, Sec. (2) in that it contains no statement of the basis of jurisdiction of this Court and no specific statement of the questions presented.

(2) The Circuit Court of Appeals committed no error in—

(a) reviewing and weighing the entire testimony;

(b) finding a presumption of fault in the navigator of the vessel or finding the existence of fault in the navigator exclusive of the presumption;

(c) finding that petitioner was not entitled to limit liability.

(3) Authorities urged by petitioner are not in conflict with decision of the Circuit Court.

ARGUMENT IN OPPOSITION TO PETITION.

POINT I.

The petition does not comply with the provisions of United States Supreme Court Rule 38, Sec. 2.

It does not contain a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the decision of the Circuit Court of Appeals in this case. Nor does it contain a statement of the questions presented for review by this Court, although it does contain a statement of the reasons relied on for the allowance of the writ.

True, the petitioner's supporting brief contains a jurisdictional statement, but not even in the brief is there found the questions specifically brought forward by the petitioner.

It is respectfully submitted that for failure to comply with the rule as herein stated, this petition should be denied; no substantial Federal question has been properly presented.

Layne & Bowler Corporation v. *Western Well Works, Inc.*, 261 U. S. 387, 67 Law Ed. 712.

POINT II.

The Circuit Court of Appeals committed no error in the rulings complained of by petitioner.

(A) The Circuit Court was correct in reviewing and weighing the entire testimony presented in the trial court.

It is a rule too well known to require stating that in an admiralty appeal, there is a trial *de novo* in the Circuit Court and the power to reverse is fundamental.

In this case, the petitioner complains that the Circuit Court of Appeals for the Fourth Circuit did not give to the Findings of Fact and Conclusions of Law of the trial court, the usual weight to which such Findings of Fact and Conclusions of Law are entitled, on the ground that the trial Judge did not comply with the provisions of Admiralty Rule 46½ because the Court did not itself find the facts specially and state separately its Conclusions of Law thereon.

But, it is to be noted that the Circuit Court of Appeals in its opinion (R. 150) specifically stated that the practice by the lower court of signing Findings of Fact and Conclusions of Law and Decree without substantial change after the decision as presented by the successful proctor, is the reason why such Findings of Fact, Conclusions of Law and Decree are not as trustworthy as if the rule had been followed.

It is obvious, in this case, from a complete review of the evidence that the findings of the trial court, of all the most important facts, were either without evidentiary basis or against the weight of the testimony. In such cases it is the universal rule that the Circuit Court of Appeals is under a duty to weigh the evidence and reach its independent judgment and, if necessary, reverse the trial court because the Circuit Court has a final responsibility for the facts as well as for the law.

In the case of *The Ernest H. Meyer,* 84 Fed. (2) 496, the Court said, at page 500, following the quotation from that same case contained on page 9 of the petition:

> "* * * In so weighing the evidence it is not weighed with the end in view of determining whether a part of the evidence warrants an inference supporting the finding. *We must weight the whole evidence.* We so understand the recent opinion in The Mauretania (C. C. A. 2), 80 F. (2d) 225, 228, when he speaks of our going 'at large into the evidence' to determine the correctness of the findings and of the value of the District Judge's decision as 'the *aid* to be derived from his consideration of the facts and the law'. Cf., The Mable (C. C. A. 9), 61 F. (2d) 537, 540."

It is respectfully submitted that the Circuit Court of Appeals in the instant case followed exactly that procedure.

A few examples taken from the Findings of Fact in this case (R. 92-97) should suffice to show clearly the error of the trial court and the harmful result of the practice followed by the trial court in violation of Admiralty Rule 46½.

Finding of Fact No. 5 (R. 93) states that R. R. Stone orally chartered the tug *Stone 6* for a charter hire of $80.00 per month and that he had no privity or knowledge of the disaster. Whereas the evidence shows clearly that at the time of the disaster and for nine years before, the tug in question had belonged to a person declared by the courts of North Carolina to be incompetent; for whom a guardian had been appointed; that the guardian knew nothing of the incompetent's ownership of the tug and had never received any charter money from the so-called charter, nor had any offer of payment ever been made up to the time of the trial, of any charter money, nor had any Court, authorized the chartering of the incompetent's tug. Nor was the alleged charter to run for any definite period of time (Tate, R. 8-10 inc.).

Moreover, it is clear from the evidence, that R. R. Stone, acting through his *alter ego,* H. B. Stone, who had all possible powers of managing the business and who could in the language of R. R. Stone—"attends to it all. He is my son. He has the power to do anything he pleases, anything at all" (R. 72, 73), sent insufficient tugboat power to assist the vessel under the circumstances (R. 6).

Furthermore, the contract was personal between H. B. Stone and Mr. Edwards, the representative of the cargo laden on the vessel (R. 4, 5).

Finding of Fact No. 8 (R. 94) states that the petitioner contracted only to render tug service and only as an incident to the tug service did Captain Dosher, the regular pilot and docking master of petitioner, direct the navigation of the vessel; whereas the record is replete with facts to the contrary from the evidence of R. R. Stone (R. 71, 72) and the testimony of Dosher (R. 10-11 to 20 incl.) that the contract was not only for towage but also for pilotage and resulted in pilotage as well as towage.

Finding of Fact No. 9 (R. 94) states that the tug *Stone 6* was of sufficient power for the service to the vessel, whereas in point of fact, the disaster itself showed to the contrary; and, Dosher himself testified (R. 157) that the only way to have broken the sheer was to have had an additional tug lashed to the vessel's starboard quarter (R. 139).

Finding of Fact No. 11 (R. 95, 96) states that there were no freshet conditions on the day of the disaster, whereas the evidence to that effect by Dosher, at the trial, is not at all credible in view of his previous testimony, four days after the disaster, before the "C" Marine Investigation Board, in which he assigned the cause of the sheer to a freshet half run down and half run off (Opinion, R. 154, 154; R. 144).

See: Texas Gulf Sulphur Exhibit 4;
(Opinion, R. 154-155; Cooper, R. 87-88).

See, also, the testimony of Tracy Cobb, civil engineer in charge of rivers and harbors at Wilmington, N. C., who stated positively (although the testimony, we submit, was improperly excluded) that there was in fact a freshet on the day in question (R. 142-144). (See, particularly Dosher, R. 144.)

Finding of Fact No. 12 (R. 95) states that the vessel collided only with the fender piling at the southeast corner of the bridge opening; and, Finding of Fact No. 13 (R. 95, 96) states that upon investigation, it was found that the vessel had struck her bottom on a pile of rocks whose existence was theretofore unknown at a point about fifty feet outshore (that is, in the channel fairway) from the said fender piling; whereas, this is clearly untrue and absolutely contrary to the testimony.

Petitioner's witness, Sherman, testified as follows:

> "Q. Would you say from this location of the ship that it hit what you have called the highest rocks on the West side of the channel? A. Yes, on the West side of the draw, and *outside of the channel.* Right on the edge, right in line to the back of the pier.
>
> Q. *And not in navigable channel?* A. *Yes*" (R. 185). (Italics ours.)

Finding of Fact No. 15 (R. 96) states that the engines of the *Severance* did not start in reverse motion until just at the moment of contact with the fender piling; whereas, in fact, there is no positive testimony to this effect. Petitioner's witness, Dosher, stated that that was his opinion, but that he could not possibly testify to that under oath, as his position on the vessel was such that he could not tell (Dosher, R. 184). Whereas Third Mate Cooper testified that upon the signal to reverse, the engines started immediately but that the vessel could not start going astern for a minute or so (Cooper, R. 80, 82, 83).

Finding of Fact No. 18 (R. 97) states that prior to and at the time said sheer started, Dosher did all he could do to correct the sheer and keep the *Severance* on a straight course; whereas, we have shown that this finding is not borne out by the testimony.

Finding of Fact No. 19 (R. 97) states that the *Severance* is what is called a cranky vessel and tended to sheer without warning; and, Finding No. 20 (R. 97) states that Captain Dosher had no notice of the bad steering qualities of the *Severance* or of any slack in her rudder chain; whereas, in point of fact, the evidence is overwhelming that the *Severance* bore only the regular characteristics of a turret type vessel and had no strange peculiarities of her own; (Debnam, R. 52) and petitioner's witness, Dosher, testified he knew these turret type ships, like the *Severance;* that he had handled one or two before; that he did not ascribe the sheer to the crankiness of the vessel but to a freshet, smelling the bottom, or some unknown cause, and that he had heard that the turret type ships weren't very good handling ships (Dosher, R. 67-68).

From the foregoing clearly erroneous findings of the trial court, it is evident that the Circuit Court was amply justified in reviewing the entire trial testimony and in rendering its decision reversing the trial court.

(B) The Circuit Court of Appeals was correct in holding that there was a presumption of negligence running against the navigator of the *Severance*; and that there was fault in the navigator, exclusive of the presumption.

All of the testimony shows that at the time of the collision between the *Severance* and rocks on the bottom, out of the channel, and the fender piling system of the drawbridge, that the vessel's navigation was solely in charge of Captain Dosher, the regular pilot and docking master of petitioner R. R. Stone, who had the tug *Stone 6,* assisting in the maneuver.

It is respectfully submitted that the mere fact of such a collision compels a presumption of negligence on the part of Dosher, the employee of petitioner Stone.

In *Atlee* v. *Northwestern Union Packet Co.,* 88 U. S. 619 (21 Wallace 389), it was specifically held that the river pilot then in charge of the vessel was under a duty of being familiar with all dangers permanently located in the course of the river, such as sunken snags, sand piers, sunken rocks or trees, or abandoned vessels or barges and that where a vessel was grounded as the pilot maneuvered her in the river for the purpose of docking, then the fault of the pilot must be inferred, in the absence of good proof exculpating him.

To like effect is the case of *Matheson, et al.* v. *Norfolk & North American Steam Shipping Co.,* 76 Fed. (2d) 177.

Again, in the case of *Louis Dreyfus, et al.* v. *Paterson Steamships,* 43 Fed. (2) 824, at 825, the Court says:

> "It is extremely unlikely that the Advance should have taken the ground where and when she did, unless the local pilot then in charge had been negligent. At the trial he was not called, and the master, who was with him on the bridge, had no explanation except somewhat faintly to suggest that the ship had been carried off to port by the river currents. He had already cautioned the pilot that he was keeping up too far to the left, and when the ship lost way, she sagged over to port, and her bottom on that side was impaled upon some rock or lost anchor, which stove a small hole through her planks. We cannot hold it good navigation to let a ship go ashore which in calm water is passing through a well-known channel, subject only to those currents which are, or should be, known to the navigator. To be sure, such things can happen; there are twists of current, like those of the sea, against which prudence will not defend, but in the case at bar their existence rests merely in supposition. We know that the ship was out of position, that her loss of way was to be

> expected, that ships commonly pass through the channel without injury, that nothing unusual here interfered with navigation. This makes a situation from which we must infer fault unless good proof exculpates the navigator * * *".

Moreover, it is clear from the overwhelming weight of the evidence that on the date of the disaster, freshet conditions prevailed in the North West Branch of the Cape Fear River, and these were known or should have been known to petitioner's employee, Dosher, who was piloting the *Severance,* as we have already shown by references to the record. Under these circumstances, it was clearly negligence for pilot Dosher to attempt the maneuver with one tug of 200 h.p. when other tugs were available R. R. Stone (R. 73), and he himself testified that the sheer could have been prevented by having another tug on the vessel's starboard quarter (R. 139). Such negligence was, by familiar rules, imputable to petitioner.

It is evident that a presumption of negligence arises in this case against the pilot. However, the pilot Dosher was not the agent of the steamship owners, as there was no pilotage clause to that effect. Dosher remained the agent and employee solely of the petitioner; the presumption of negligence arising from the collision outside the channel runs against the pilot and against his employer R. R. Stone, who was an independent contractor.

> *The West Eldara,* 104 Fed. (2d) 670;
> *Wilmington Railway Bridge Company* v. *Franco-Ottoman Shipping Company,* 259 Fed. 166.

(C) The Circuit Court of Appeals was correct in holding that petitioner was not entitled to limit his liability.

The Circuit Court of Appeals decided that petitioner was not entitled to limit liability, under the provisions of 46 U. S. C. A. 185, 186, upon two grounds—perhaps on

three grounds, as will be shown. First: R. R. Stone was not a charterer of the Tug No. 6; Second: because of his privity and knowledge (Opinion, R. 157-161). In this we think the Court was clearly correct.

The Limitation of Liability Statutes clearly, from their very words, were intended to relieve, protect, and encourage only those persons who were lawful owners or charterers of vessels. Certainly, no such protection was intended for one not an owner or charterer, but at most a bailee or, more probably, a wrongful intermeddler and trustee *ex malificio.*

Certainly a bailee is not entitled to the benefits of the Act. *Jones & Loughlin Steel Corporation* v. *Vang,* 73 Fed. (2d) 88.

And, a bailee is the most that petitioner, R. R. Stone, could claim to be at the time of this disaster. There clearly is no evidence of a charter, which is an express contract by which the owner lets a vessel or some particular part thereof to another person for a specified time or use. *Jones & Laughlin Steel Corporation* v. *Vang, supra; Benedict on Admiralty,* 6th Ed., Vol. I, p. 292; *Ward* v. *Thompson,* 63 U. S. (22 How.) 330.

The uncontradicted evidence shows that, at the time of the disaster, the tug *Stone No. 6* belonged to Thomas H. Stone, the incompetent son of petitioner, R. R. Stone, for whom Peoples Savings Bank and Trust Company had been appointed guardian in 1931; that the guardian did not know its ward owned the tug till after the disaster; it was not listed among the assets of the incompetent owner by his previous guardian and brother, petitioner's general manager, H. B. Stone; and, no charter hire was ever paid by petitioner for this tug; nor was there ever a court order approving such an alleged charter, nor was the letting of the tug in accordance with North Carolina law. N. C. General Statutes—33-21. See also N. C. General Statutes—33-20.

For the evidence on this point, we refer to the testimony of R. H. Tate (R. 8-10). The petitioner himself merely states that he was bare boat charterer, and was to pay $80.00 per month charter hire (Stone, R. 68-69). It is not contended that one cent of charter hire was ever paid.

It would seem that petitioner was simply using his incompentent son's tug at the time of the disaster, without the sanction of law, and without payment for its use. He was a trustee *ex maleficio.*

Uzzle v. *Word,* 54 N. C. 226;
Pate v. *Kennedy,* 104 N. C. 234.

It is submitted that the protection of the Limitation of Liability Statutes does not, by intent or phraseology, extend to or benefit such a person.

Secondly, the Circuit Court was clearly correct in denying petitioner the right to limit liability on the ground of privity and knowledge. He had abdicated as head of the Stone Towing Line, in favor of his son, H. B. Stone. At the time of the disaster Petitioner was a man of advanced age; and was in ill health (Stone, R. 68); he had not attended to any business or been in active charge of Stone Towing Line for seven or eight years before this disaster, due to sickness (Stone, R. 72). Petitioner testified that his son, H. B. Stone, was in complete charge of the business; he said—

> "A. Yes, he attends to it all. He is my son and he has the power to do anything he pleases, anything at all" (Stone, R. 72, 73).

The place of business of Stone Towing Line was directly on the wharf (on the Cape Fear River) (Stone, R. 73). After having made the contract with a representative of the Texas Gulf Sulphur Co., who was plainly acting for hull and cargo (H. B. Stone, R. 4-5) for pilotage and tug-

boat assistance, H. B. Stone actually sent the tug *Stone No. 6,* which proved insufficient under the circumstances, for tugboat assistance (when additional Stone tugs were available) (R. 73) with Captain Dosher to act as pilot, to the *Severance.*

Obviously, whenever petitioner, R. R. Stone, trading as Stone Towing Line, engaged in any activity as Stone Towing Line, he could act only through H. B. Stone, his son. Plainly, then, the law with respect to privity and knowledge, which would bind a corporation under the circumstances likewise should bind petitioner. He, like a corporation, was incapable of acting except through an agent—and this agent was H. B. Stone.

> *In re Great Lakes Transit Corporation,* 81 F. (2d) 441;
> See also *Coryell* v. *Phipps,* 317 U. S. 406.

H. B. Stone, situated immediately on the riverfront, sent one tug of insufficient power and pilot Dosher to take the *Severance* up the river and through the drawbridge. He actually saw the start of this maneuver (H. B. Stone, R. 7). He knew, or is required to know the river conditions, as a dispenser of towage and pilotage. He was himself in privity or had knowledge of the fault or neglect which caused the disaster—and such privity or knowledge should, on principle, be imputed to petitioner and should prevent his limiting liability.

> *Coryell* v. *Phipps, supra.*

POINT III.

Authorities urged by petitioner are not in conflict with the decision of the Circuit Court.

Petitioner's brief (p. 19) cites Benedict on Admiralty, which was published in 1940, and 44 Harvard Law Review, 1-35, which was published in 1930.

It is submitted that the more recent opinions are more authoritative in that the workability of Admiralty Rule 46½ has been clearly proven and there is now no conflict among the Circuits as to the practice under that rule. The subsequent authorities are hereinafter set forth in this brief.

Petitioner's brief (p. 20), cites *The Dynamic,* 123 Fed. (2) 999, as being in conflict with the decision in this case. The reverse is true. Petitioner has failed to print the following quotation, indicated by asterisks in his brief.

> "We agree fully with the spirit and the terms of the resolution passed by majority vote of the judges at our Judicial Conference of last June recommending *'that the trial judge make brief, pertinent findings in respect to contested matters and file the same in connection with his opinion'.* This puts the emphasis wher it should be, namely, on brief and pertinent findings of contested matters, and also upon a finding made as a part of the judge's opinion and decision, rather than the delayed, argumentative, *overdetailed documents prepared by winning counsel after the event which often appear in appellate records,* though they are not effective aids to adjudication" (p. 1001). (Italics ours.)

Referring to the practice of having counsel submit findings, that opinion particularly stresses that such procedure is desired, *before the Court has made its decision.* The very quote from that case in petitioner's brief (p. 20) sets forth:

> "Of course, we do not mean to imply that a trial court is not privileged to seek such aid of counsel, both as to the facts and the law, as it thinks desirable *prior to and as a step in decision;* or to limit or restrict in any way the procedure for amending or otherwise correcting finding set forth in F. R. C. P. 52(b)." (Italics ours.)

In the case at bar, the trial Court wrote proctor for petitioner a letter stating that petitioner was without fault and was exonerated, and told him he was at liberty to present Findings of Fact, and Conclusions of Law and a suitable Decree for the consideration of the Court. There was no other opinion, either written or oral.

Page 7 of Petition cites *Shilling* v. *Schwitzer-Cummins Co.,* 142 F. (2d) 82, 83, as being in conflict with the decision in this case. This is not a fact.

Miller, Associate Justice, there stated (p. 84), that:

> "The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence."

The Circuit Court in an endeavor to learn whether the "findings" were supported by the evidence had, of necessity, to examine all the evidence, which disclosed that the findings were not supported by the necessary credible evidence. Just how unreliable and misleading such findings were is clearly demonstrated elsewhere in this brief.

Page 22 of Petitioner's brief cites *United States* v. *Crescent Amusement Company,* 323 U. S. 173 at 174, 175, as being in conflict with the decision in this case. A careful examination of that opinion fails to establish petitioner's assertion; in fact it is contra to that assertion:

That very opinion states (pp. 184, 185):

"The findings leave much to be desired in light of the functions of the trial court. See *United States* v. *Fomers* (C. C. A., 2d), 125 F. (2d) 928, 942, 943."

Referring to the above citation, we find that Frank, Ct. J. (p. 942), there cites the *Dynamic* case—which we have considered in this brief, and continues with the strongest possible condemnation of the practice indulged in by the trial Court in the case at bar. It is fair to assume that having referred to the opinion of Frank, Ct. J. as an authority, the Supreme Court looks with favor upon that opinion. The Court said (p. 942):

"In the instant case, a comparison of the findings with the opinion seems to show that *the findings proposed by the defendants were mechanically adopted,* with the consequence that some of the findings made by the district court are not supported by the evidence *and not substantially in accord with the opinion.* Such a result *can usually be avoided by following what we believe is the better practice of filing findings with the opinion,* when the evidence is still fresh in the mind of the trial judge, and permitting the parties to file objections under Federal Rules of Civil Procedure, rule 52(b). See *Matton Oil Transfer Corp.* v. *Tug Dynamic, supra.*

(21) We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous'. Chief Justice Hughes once remarked, 'An unscrupulous administrator might

be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And *Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer.* The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards." (Italics ours.)

Page 9 of the Petition urges the case of *The Ernest H. Meyer,* 84 Fed. (2) 496, as an authority for its contention and cites eight lines from that opinion. However, had that very citation been continued it would have been crystal clear that the appeal court must *weigh the whole evidence.* It reads:

"In so weighing the evidence it is not weighed with the end in view of determining whether a part of the evidence warrants an inference supporting the finding. We must weight *the whole evidence.* We so understand the recent opinion in The Mauretania (C. C. A. 2) 80 F. (2d) 225, 228, when he speaks of our going 'at large into the evidence' to determine the correctness of the findings and of the value of the District Judge's decision as 'the *aid* to be derived from his consideration of the facts and the law'. Cf., The Mabel (C. C. A. 9), 61 F. (2d) 537, 540.

(4) In such weighing of the evidence we are required to make our independent examination, thought and judgment' just as did the Supreme Court in The Ariadne, 13 Wall. 475, 479, 20 L. Ed. 542, one of the last Supreme Court cases before the Act of 1875, abolishing trials *de novo* in admiralty

appeals. There, in reversing where both the District Court and Circuit Court had made the same finding as to fault in a collision case, the Court holds the rule in admiralty appellate new trial to be as follows:

> 'We are not unmindful that both the Circuit and District Court came to a conclusion different from ours as to the alleged fault of the steamer.
>
> 'Their judgments are entitled to, and have received, our most respectful consideration. Their concurrence raises a *presumption, prima facie, that they are correct.* Mere doubts should not be permitted to disturb them. But the presumption referred to *may be rebutted.* The right of appeal to this court is a *substantial right,* and not a shadow. *It involves examination, thought, and judgment.* Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect'." (Italics supplied.)

Although the above case refers to "abolishing trials *de novo* in admiralty appeals," this Court has held in *Brooklyn Eastern, etc.* v. *United States,* 287 U. S. 170, that

> "In admiralty an appeal to the Court of Appeals is deemed to be a trial *de novo* (citing many cases)." (176.)

Page 10 of Petition complains that the Circuit Court of Appeals followed cases which involve only collisions between moving vessels and stationary objects and asserts the inapplicable presumption in the case at bar of such decisions.

That is an astounding assertion for the reason that the *SS Severance* was a moving vessel and it collided *outside the channel* with rocks on the bottom and the stationary fender system and piling of the bridge.

Page 11 of Petition cleverly attempts to convey the impression that it agrees with the rule in the case of *Coryell* v. *Phipps,* 317 U. S. 406 and then cites, what it would have this court believe, was such rule. However, the citation purposely omits the balance of that paragraph and is torn from its context and so lacks its true meaning. Continuing, that citation reads—

> "*Some cases,* however, *have barred the individual owner from the benefits of the statute even though the element of personal participation in the fault or negligence was not present.* Thus it has been thought that the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity (*Re* New York Dock Co., *supra* (C. C. A. 2d 61 F. (2d), p. 779) as well as knowledge. *Re* Great Lakes Transit Corp., *supra* (C. C. A. 6th), 81 F. (2d), p. 444). We need not reach those questions in this case. Privity like knowledge turns on the facts of particular cases." (Italics ours.)

It is thus evident from the opinion that the assertion contained on page 12 of petition is false, where it states that it has been held in *Coryell* v. *Phipps, supra,* that "* * * only the actual knowledge of Petitioner, R. R. Stone, will constitute privity on his part". H. B. Stone, the son, had complete charge of the business and had been the "alter ego" of his father, R. R. Stone, for seven or eight years, who testified (R. 160):

> **"Q. Your son, H. B. Stone, is in charge? A. Yes, he attends to it all. He is my son and he has the power to do anything he pleases, anything at all."**

Page 12 of Petition asserts that the opinion of Judge Brown in *Moore* v. *Sun Printing & Publishing Ass'n,* 95 Fed. 487, is in conflict with the opinion in the case at bar. The reverse is true. That decision does not contemplate

a charter with an owner, who was legally incompetent and had been so for years, as has been shown elsewhere in this brief. Petitioner is here urging such a contract, odd as it sounds.

It is submitted that there is no conflict between the opinion of the Circuit Court and the authorities urged by petitioner, and that it has been shown that no conflict exists between the decision of the Circuit Court and the decision of any other Circuit Court; nor, did the Circuit Court decide an important Federal question which has not been but should be settled by this Court; nor, did the Circuit Court decide a Federal question, probably in conflict with the applicable decision of this Court.

POINT IV.

The petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL SPEER,
Counsel for Respondent, Diamond Steamship Transportation Corporation.

GEORGE ROUNTREE, JR.,
of Wilmington, N. C.

GERALD J. McKERNAN,
of New York, N. Y.,

On the Brief.

FILED
MAY 13 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1945

No. 1137

R. R. STONE, trading as STONE TOWING LINE, etc.,
Petitioner,

against

DIAMOND STEAMSHIP TRANSPORTATION CORPORATION and TEXAS GULF SULPHUR COMPANY, INC.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT TEXAS GULF SULPHUR COMPANY, INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

THOMAS H. MIDDLETON,
Counsel for Respondent,
Texas Gulf Sulphur Company, Inc.

HILL, RIVKINS & MIDDLETON,
On the Brief.

BOWNE & CO., NEW YORK CITY

INDEX

PAGE

Statement 1

Facts 1

Outline of Argument 4

ARGUMENT:

I. There is no conflict between the Circuits as to the meaning of Rule 46½ 4

II. The power of the Circuit Court of Appeals to reverse the District Court on factual issues in an admiralty appeal is fundamental 8

III. The Court below correctly held that there was a presumption of Dosher's negligence arising from the mere fact that the ship while navigating under his sole direction and control, struck the stationary bridge abutment 12

IV. The Court below correctly denied limitation of liability to the petitioner 14

V. The application for a writ of certiorari should be denied 21

CASES CITED.

A. G. Brower, The (CCA 2) 220 Fed. 648 12
Albany, The (CCA 2) 81 Fed. 966 12
Allegheny, The (CCA 3) 252 Fed. 6 13
Appeal of Cahill (CCA 2) 124 Fed. 63 12

Brandywine, The, 87 Fed. 652 11
Brooklyn Eastern, etc. v. United States, 287 U. S. 170 12

PAGE

Charlotte, The, 285 Fed. 84, affd. (CCA 2) 299 Fed. 595, cert. den. 266 U. S. 604 13
City of New York v. McLain Line (CCA 2) 147 Fed. (2d) 393 7

Dynamic, The, 123 Fed. (2d) 999 ..... 6, 7

Ernest H. Meyer, The (CCA 9) 84 Fed. (2d) 496 8

Great Lakes v. Shenango (CCA 6) 238 Fed. 480 13

Jones & Laughlin v. Vang (CCA 3) 73 Fed. (2d) 88 certiorari denied by this Court at 294 U. S. 735 .. 20
J. S. T. Stranahan, The, 151 Fed. 364, affd. (CCA 2) 165 Fed. 439 13

Kia Ora, The, 252 Fed. 507 11
Kiernan v. Lake Champlain, 273 Fed. 499 13

Lake Drummond v. Roper (CCA 4) 252 Fed. 796 12

Matheson v. Norfolk, etc., Co., 76 Fed. (2d) 177 14
Mercury, The, 2 Fed. (2d) 325 9

Perseverance, The (CCA 2) 11 Fed. (2d) 527 9
President Polk, The (CCA 2) 43 Fed. (2d) 695 9

Royal Exchange v. Graham, 166 Fed. 32 ..... 11, 12

Schilling v. Schwitzer (CCA DC) 142 Fed. (2d) 82 .. 7
Standard Tramp v. Wood (CCA 4) 64 Fed. (2d) 282 . 13
S. W. Morris, The, 59 Fed. 616 14

Thorne v. Reading Co., 87 Fed. (2d) 694 11

United States v. Crescent Amusement Co., 323 U. S. 173, 89 L. Ed. 166 7

White City, The, 285 U. S. 195 13

Supreme Court of the United States

OCTOBER TERM—1945

R. R. STONE, trading as STONE TOWING LINE, etc.,
Petitioner,

against

DIAMOND STEAMSHIP TRANSPORTATION CORPORATION and TEXAS GULF SULPHUR COMPANY, INC.,
Respondents.

No. 1137

BRIEF ON BEHALF OF RESPONDENT TEXAS GULF SULPHUR COMPANY, INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement.

This is an application for a writ of certiorari by R. R. Stone, doing business as Stone Towing Line, as alleged charterer of the tug *Stone No. 6,* to review the decision of the United States Circuit Court of Appeals for the Fourth Circuit, wherein that court held petitioner liable for loss caused by collision between the steamer *Severance* and a highway bridge across the Cape Fear River, Wilmington, N. C. on November 23, 1940, and denied petitioner's prayer for limitation of liability.

Facts.

In order to understand the issues involved in this application it is necessary to supplement, to a certain extent, the recital of facts set forth by petitioner at pages 4 to 6 of his petition.

On November 23, 1940, petitioner, for a valuable consideration, undertook to assist the *Severance* from her anchorage off Wilmington, N. C., up the Cape Fear River to Nevassa (H. B. Stone, 136).*

As a part of the service furnished by petitioner, he supplied his own pilot, Captain Dosher, to navigate the ship up the river and through the bridge to the dock at Nevassa. Captain Dosher was supposed to be in complete charge of the navigation of the ship subject, of course, to the orders of the master (R. R. Stone, 121-122).

On the morning of November 23, 1940, Dosher boarded the *Severance* and went up on her bridge, and the tug *Stone No. 6*, pursuant to Dosher's orders, made fast with a hawser to the steamer's bow. The tide was last of the ebb, with only a slight wind prevailing (Petitioner, Article Fifth, p. 1).

Dosher told the master of the *Severance* that he had delayed his arrival at the ship in order to move her when "the tide was right". Dosher then ordered the ship's anchor heaved up and her engines put ahead, and she then proceeded up the river, with her navigation in complete charge of Dosher (Hardy, 124-125; Cooper, 130; Dosher, 138-139).**

Shortly after getting under way, Captain Hardy, the master of the *Severance*, asked Dosher if it would be all right for him (Hardy) to leave the bridge and have his lunch. Dosher answered, "Yes, go ahead", or words to that effect, and Hardy then went below (Hardy, 126).

Cooper, the third mate of the *Severance*, was on the

---

* References are to the renumbered pages of the record in this Court, unless otherwise stated.

** A part of Chart No. 425, put in evidence at the trial as Exhibit P-4, is annexed at the end of this brief, so that the Court may see the *locus in quo*, including the highway bridge, with which the ship collided. Point Peter, which is the point of confluence between the Northeast and Northwest Branches of the river, is marked with the figure 1, and the highway bridge with which the ship collided, is marked 2.

bridge standing by the engine room telegraph to relay any orders from Dosher as to engine movements and there was a seaman at the wheel. Both Cooper and the helmsman were acting under orders of Dosher (Cooper, 130).

Shortly after the ship turned to proceed up the Northwesterly Branch of the Cape Fear River, she took a sheer to port and Dosher ordered her engines put full speed astern and the helm hard right. The helm order was obeyed by the helmsman and Cooper promptly put the telegraph at full astern and could tell by the ship's vibration that the engine room had responded promptly. However, the ship continued sheering to port until her port bow struck the highway bridge abutment with such force that she promptly sank in the river (Cooper, 130-131; Dosher, 144; Petition, Article Fifth, p. 2).

Petitioner states at page 6 of his petition, that the ship struck rocks "the location of which was not known by anyone prior to the disaster," and that the rocks were "outshore of the fender piling by a distance of about 50 feet" (which would locate the rocks in the channel of the drawbridge), citing the testimony of Sherman at page 34 of the Record. Not only does the testimony cited fail to support that statement, but also Sherman was very clear and unequivocal that the rocks were out of, and *not* inside, the channel.

On cross examination he was questioned about the location of the rocks, and testified:

> "Q. That is (the rocks were) *outside the channel,* going into the draw? A. *Yes.*
>
> * * * * * * * *
>
> Q. Would you say from this location of the ship that it hit what you have called the highest rocks on the west side of the channel? A. Yes, on the west of the draw, *and outside the channel* * * *" (Sherman, 185). (Emphasis supplied.)

Outline of Argument.

It is a bit difficult to grasp the theory under which petitioner asks this Court to grant a writ of certiorari. Apparently petitioner contends primarily that there is a difference among the Circuit Courts of Appeals as to the meaning of Rule 46½ of this Court; that the Circuit Court of Appeals in this case had no power to reverse the District Court on factual issues; that there is no presumption of fault against petitioner arising from the fact that the ship collided with a stationary object; and that the Court erred in not granting petitioner limitation of his liability to the comparatively insignificant value of the tug *No. 6*.

As to these contentions we shall argue that there is no conflict in the constructions made by the several Circuit Courts of Appeals on the meaning of Rule 46½; that the power of the Circuit Court of Appeals to reverse the District Court on factual issues in an admiralty case is fundamental; that there is a clear and settled presumption of fault against petitioner arising from the mere fact of the collision; and that even if the court erred in holding that the petitioner was guilty of privity of knowledge in connection with the collision, the result reached was nevertheless correct in that petitioner was not a charterer of the tug at the time of the accident but was a mere bailee thereof, and limitation was properly denied him on that ground also.

ARGUMENT

I. There is no conflict between the Circuits as to the meaning of Rule 46½.

Petitioner is hard put to it to find some ground upon which this Court might grant him a writ of certiorari.

Struggling desperately to find such a ground petitioner would have this Court believe that there is a conflict in construing the meaning of Rule 46½ between the Fourth Circuit, on the one hand, and the Circuit Court of Appeals for the District of Columbia, the Second Circuit, the Eighth Circuit and the Ninth Circuit, on the other. The difference, if any, is more fancied than real.

Indeed, the wording of the Rule requires the trial court to find the facts and state the conclusions of law, and so far as we are aware all of the Circuit Courts of Appeals have construed that language to mean exactly what it says. We know of no appellate court decision which has reversed the District Court under Rule 46½, and in the instant case there is no reversal under that rule.

It must be remembered that in the case at bar, the District Court delivered no opinion whatsoever, but merely wrote to the proctor for petitioner a letter, wherein he said:

> "I am of the opinion and so hold that the petitioner is without fault and therefore should be and is exonerated from all liability.
>
> "In view of the foregoing you are at liberty to present to me for my consideration a suitable Decree embracing therein Findings of Fact and Conclusions of Law" (Record, pp. 105-106).

Although proctor for petitioner prepared the findings of fact and conclusions of law, and to all intents and purposes wrote an opinion for the District Court, still the Circuit Court of Appeals in this case did not reverse the District Court on that ground. In delivering the opinion of the Circuit Court of Appeals, Circuit Judge DOBIE said:

> "No opinion was filed by the District Judge who wrote the proctor for respondents that the District Judge found the respondents without fault and therefore relieved of liability. In this letter the

> District Judge requested the proctor for respondents to present findings of fact and conclusion of law. The District Judge then, practically in toto, adopted these findings and conclusions.
>
> This practice is not to be recommended. It has been condemned by many courts as not living up to the provision of Admiralty Rule 46½: 'In deciding cases of admiralty and maritime jurisdiction, the Court of first instance shall find the facts specially and state separately its conclusions of law thereon.' See *Irvine* v. *The Hesper,* 122 U. S. 256; *Petterson* v. *New York Central Railroad Co.,* 126 F. (2d) 992; *Schilling* v. *Schwitzer,* 142 F. (2d) 82; *City of New York* v. *McLain Lines,* 147 F. (2d) 393; *Chicago* v. *Moore,* 259 Fed. 490. We do not hold that the practice affords a ground for reversing the decree of the District Court. We content ourselves by observing that these findings of fact and conclusions of law are not, at our hands, entitled to the same weight and dignity which they would have possessed had they represented the unfettered and independent judgment of the trial judge" (Opinion, 150-151).

It seems too clear to require argument, and it is respectfully submitted, that findings of fact made by counsel for the prevailing party are not entitled at the hands of an appellate court to the same weight and dignity which would be accorded them had they represented the independent judgment of the trial judge.

The decision of the Second Circuit in *The Dynamic,* 123 Fed. (2d) 999 (Brief, pp. 7, 20), is not in the least at variance with the above quoted language. There the court said that, while it was not disposed to insist upon the trial court finding the facts with "detail or particularization", still "The findings and conclusions of the court * * * which actually led it to decision are helpful; and we do not think trial courts will find it unduly burdensome to state those briefly and concisely at the time decision is made" (1001).

Certainly, we submit, it cannot fairly be said that the language of the court in *The Dynamic* is in conflict with the language of Judge DOBIE in the case at bar. Indeed, that same court, three years later, clarified its views on the meaning of Rule 46½, where, in the case of *City of New York* v. *McLain Line* (CCA 2) 147 Fed. (2d) 393, in reversing the District Court, it said:

> "It is fairly obvious from the record, and it was conceded at the oral argument here, that the findings, filed a month after the oral opinion, were substantially those presented to the trial judge by the proctors for the barge-owner, the successful libelant. On the unfortunate and undesirable character of findings thus made we have often commented, calling attention to the importance of findings because they bind the upper courts unless clearly erroneous and because findings carefully made ensure a painstaking review of the evidence" (395).

Nor is *Schilling* v. *Schwitzer* (CCA DC) 142 Fed. (2d) 82 (Brief, pp. 7, 20), in conflict with the decision in this case, for in that case the court said that:

> "What the law requires * * * is that the findings as made, shall *be those of the trial judge himself*" (84). (Emphasis supplied)

Nor does this Court's holding in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 89 L. Ed. 166 (Brief, pp. 8, 22), run counter to the holding below. In that case this Court said:

> "The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. See United States v. Fomers (C.C.A.2d) 125 F. (2d) 928, 942, 943. But they are none the less the findings of the District Court, and they must

stand or fall depending on whether they are supported by the evidence'' (184-185).

In the case at bar the Circuit Court of Appeals did not consider the findings supported by the evidence, and set them aside upon the ground, as is argued *infra* at pages 8-11.

As for *The Ernest H. Meyer* (CCA 9) 84 Fed. (2d) 496 (Brief, p. 9), the court there held that Rule 46½ had *not* altered or modified the established principals governing trial *de novo* in admiralty appeals.

II. The power of the Circuit Court of Appeals to reverse the District Court on factual issues in an admiralty appeal is fundamental.

Petitioner complains that the Circuit Court of Appeals in this case treated the prior decree of the District Court as ''wholly vacated''. (The quotation marks are the petitioner's although we do not know why; for so far as we are aware, the words are those of the petitioner and not of the Court.)

The only factual issue, so far as concerns petitioner's liability on the merits, as to which the Circuit Court of Appeals set aside the findings below, related to the cause of the steamer's sheer. It was the position of the respondents that the ship had sheered because Pilot Dosher failed to take into consideration the currents resulting from a known and partly run down freshet, and, with the ship's navigation under his sole control, had negligently allowed those currents to cause her to sheer into the bridge fender. Petitioner, on the other hand, contended that the weather was ideal, with the tide at slack water, and relied upon the unpleaded claim (which he sought to prove by rank hearsay) that the ship had a slack rudder chain and was difficult to steer.

What the Circuit Court of Appeals did, so far as concerned that factual issue, was merely to hold that the testimony given by petitioner's pilot, Dosher, under oath before the Marine Investigation Board, four days after the accident, was more impressive and of more probative value than his later and inconsistent testimony at the trial. This was in accordance with the settled rule, as declared by the Circuit Court of Appeals for the First Circuit in *The Mercury*, 2 Fed. (2d) 325, where, in reversing the District Court, the Court said.

> "The captain's testimony shortly after the accident, before the United States Local Inspectors at Boston, is entitled to far more weight than his later and somewhat inconsistent testimony before the trial court" (325-326).

To the same effect are *The Perseverance* (CCA 2) 11 Fed. (2d) 527, and *The President Polk* (CCA 2) 43 Fed. (2d) 695, in which latter case Circuit Judge LEARNED HAND, in reversing the decree below, said that "The master's own report, made the very day of the accident, completely disposes of his testimony" (696).

In applying this rule in the case at bar, the Court below, speaking of Pilot Dosher, said:

> "* * * his testimony before the Marine Investigation Board, given four days after the accident, is at complete variance with his testimony given at the trial. Before this Board, Captain Dosher, when directly asked: 'Was the steering gear in good condition?' replied: 'Seemed to be.' Again before the Board, to the question: 'You had full cooperation from everybody on board, engine room signals answered, various orders carried out?" his reply was: 'Yes, sir.'
>
> "As to the cause of the sudden sheer of the 'Severance', the testimony of Captain Dosher before the Marine Investigation Board is very revealing:

"'Q. How do you account for the vessel taking the sheer? A. Captain, I couldn't figure that out. Usually if a vessel is going to sheer going through there they will sheer when they first strike the point. *She was going so steady,* (Emphasis supplied) until she got right in the draw and what took that notion *unless on the last of the freshet from back current on the bottom or got a suction from the bank* (Emphasis by the Court).

"And, again:

"'Did you think there was anything unusual about the current at that time? A. No, nothing that I could discern from the surface of the water at that time. *It was the last stage of a freshet* (Emphasis supplied) and there would be a kind of back current underneath, not noticeable from the top.' This is strengthened by the testimony at the trial given by Mate Cooper of the 'Severance", who was on the bridge before, and at the time of, the collision.

"'* * * in the river itself there wasn't any indication of much current at the time we got under way, because it was slack water as near as I can recall, but *when we got around this Point Peter why the tide there was running like a mill race. It was all the difference in the world'* " (Emphasis by the Court.) (Opinion, pp. 153-154).

Very little wonder, we submit, that the Court chose to accept Dosher's version given when the facts were fresh in his mind, and before any litigation had arisen, rather than his contradictory testimony given in court three and a half years later, after litigation had arisen and counsel brought into the case.

The power of the Circuit Court of Appeals to reverse the District Court on a factual issue in an admiralty case has never, so far as we are aware, been questioned. The

fact that petitioner is now questioning that power on this application for a writ of certiorari, shows, we submit, the complete lack of merit in his position.

As far back as 1898, the Circuit Court of Appeals for the Fourth Circuit, in *The Brandywine,* 87 Fed. 652, said:

> "This court is not limited * * * to the review of questions of law only in an admiralty appeal. It can also review the findings of facts. The Havilah, U. S. App. 1, 1 C.C.A. 77, and 48 Fed. 684; The State of California, 7 U. S. App. 20, 1 C.C.A. 224, and 49 Fed. 172; The Philadelphia, 21 U. S. App. 90, 9 C.C.A. 54 and 60 Fed. 423" (653).

In *The Kia Ora,* 252 Fed. 507, the same Court reversed the District Court on factual issues, saying:

> "When a careful examination of the evidence in all of its bearings result in a clear and certain conviction of the appellate court, differing from the findings of the trial court, it is *the duty of the appellate court* to follow that conviction" (509). (Emphasis supplied).

In *Royal Exchange* v. *Graham,* 166 Fed. 32, the Circuit Court of Appeals for the Seventh Circuit, in discussing a finding of fact made by the District Court in an admiralty case, said that the finding

> "is not conclusive upon appeal, but is entitled to much weight; and under conflicting testimony, with witnesses before the trial judge, will not be set aside unless it clearly appears that the conclusion is either unsupported by the evidence or against the evidence" (36).

The rule was stated by Circuit Judge Learned Hand in the Second Circuit, in *Thorne* v. *Reading Co.,* 87 Fed. (2d) 694, as follows:

> "We seldom disturb a finding of the District Court, as we have said again and again, but we have a final responsibility for the facts as well as for the law" (696).

This Court recognized the power of Appellate Courts in admiralty cases to modify or reverse fact findings below, in *Brooklyn Eastern, etc.* v. *United States,* 287 U. S. 170, saying:

> "In admiralty an appeal to the Court of Appeals is deemed to be a trial *de novo.* (citing many cases)" (176).

See also:

The Albany (CCA 2) 81 Fed. 966;
The A. G. Brower (CCA 2) 220 Fed. 648;
Appeal of Cahill (CCA 2) 124 Fed. 63;
Lake Drummond v. *Roper* (CCA 4) 252 Fed. 796;
Royal v. *Graham* (CCA 7) 166 Fed. 32.

III. The Court below correctly held that there was a presumption of Dosher's negligence arising from the mere fact that the ship while navigating under his sole direction and control, struck the stationary bridge abutment.

In ruling on this point, the Court below said:

> "We start with the rule that when the 'Severance' in complete control of Dosher, in waters with which he was familiar, on a clear day with a light wind, ran into a readily visible stationary object, the piling of the bridge, this raises a presumption of negligence on Dosher's part that at least calls for some reasonable explanation of the collision. As far back as 1877, Mr. Justice Clifford said in The Virginia Ehrman, 97 U. S. 309, 315:

> " 'Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precautions.'
>
> See, also, The Louisiana, 70 U. S. 164, 173; The Bertha F. Walker, 220 Fed. 667, 668; Savannah & New York Transportation Co. v. Klaren Bridge Co. 252 Fed. 499, 504; United States v. Norfolk-Berkley Bridge Corporation (C.C.A. 4) 29 F. (2d) 115, 126; Louis Dreyfus v. Paterson Steamships, 43 F. (2d) 824, 825" (Opinion, 152).

The rule as to the presumption is settled by a legion of cases in addition to those cited by the Court below.

See:

The J. S. T. Stranahan, 151 Fed. 364, affd. (CCA 2) 165 Fed. 439;

Kiernan v. *Lake Champlain,* 273 Fed. 499;

The Allegheny (CCA 3) 252 Fed. 6;

Great Lakes v. *Shenango* (CCA 6) 238 Fed. 480;

The Charlotte, 285 Fed. 84, affd. (CCA 2) 299 Fed. 595, cert. den. 266 U. S. 604.

The White City, 285 U. S. 195 (Brief, p. 10) has nothing at all to do with this case. That was an out-and-out towage case and the owner of the tow contended that a presumption of fault on the part of the tug arose from the mere fact of damage to the tow, on the theory that the tug was a bailee of the tow. This Court rejected the theory of a bailment.

In *Standard Tramp* v. *Wood* (CCA 4) 64 Fed. (2d) 282 (Brief, p. 10), the tug owner, as in the case at bar,

was held at fault for allowing the tow to strike a concrete bulkhead.

If, as petitioner seems to contend at page 6 of his petition, the accident was caused by the ship striking unknown and uncharted rocks, nevertheless in view of the testimony of petitioner's own witness Sherman, quoted *supra,* page 3, that the rocks were outside the channel, Dosher's negligence is established.

In *The S. W. Morris,* 59 Fed. 616, the Court laid down the following rule:

> "It is not necessary that the pilot should have knowledge of the particular rock on which he strikes. His business is *to keep the usual course,* according to the time of the tide, when he is navigating." (Emphasis supplied.)

See also:

Matheson v. *Norfolk, etc., Co.,* 76 Fed. (2d) 177.

IV. The Court below correctly denied limitation of liability to the petitioner.

The question raised by petitioner under this point (Petitioner's Brief, pp. 30-31) is in reality a moot question. It is true that the Court held petitioner guilty of privity or knowledge in the use of inadequate tug power to assist the ship. But that was not the sole ground of denying limitation. Limitation was also denied upon the ground that the petitioner was not a charterer of the tug within the terms of the limitation statutes.

In this respect Circuit Judge Dobie, in the Court below, said:

> "We think this petition for the limitation of liability should be denied for two reasons: (1) R. R. Stone was not a charterer of the tug; (2) privity and knowledge" (Opinion, 157).

One of the grounds upon which petitioner was held liable on the merits, was the inadequacy of the tug power supplied to assist the ship. On this point the Court below said:

> "Another basis for the finding of negligence here, we think, was the furnishing of a small tug, 'Stone 6' which was not competent for the proposed undertaking, when H. B. Stone sent Captain Dosher with this tug to tow the 'Severance' up the river. In *Dunn* v. *The Young America,* 8 Fed. Cas. No. 4,178, District Judge William Butler strikingly said:
>
> > " 'It was the duty of Mr. Pride and his co-contractors to furnish a tug fully competent to perform the service which they had undertaken, with safety; and, if one was not sufficient, to add another. The responsibility was on them to determine the amount of force needed, and to perform the service with the care and skill required by the circumstances.'
>
> And see, also, cases cited in this opinion under the subject of privity. The testimony of Captain Dosher here was quite revealing:
>
> > " 'Q. What was your answer to my question that if a sheer developed could it not have been prevailed by having a tug on the starboard quarter as well as the "Stone No. 6" on the bow? A. The tug when it started to sheer would have made her straight.
> >
> > 'Q. And *that would have prevented the sheer?* A. *Yes, sir.*
> >
> > 'Q. *That is (with) a tug on the starboard quarter the sheer could have been prevented?* A. *I would say that would be about the only way it could have been prevented'* " (Emphasis supplied). Opinion, 156-157.

It was upon the ground of the inadequate amount of tug power furnished that the Court imputed privity or knowledge to petitioner, saying:

"A second ground for the denial of the petition for limitation of liability, we think, is privity. It is quite clear from the testimony of R. R. Stone that the active management of the business was entrusted to his son, H. B. Stone. R. R. Stone explicitly testified:

> " 'Q. And you have not been in active charge of the Stone Towing Line since you have been sick? A. No, for the last seven or eight years I have not.
>
> 'Q. Your son H. B. Stone is in charge? A. Yes, he attends to it all. He is my son and he has the power to do anything he pleases, anything at all.'

"It would thus seem that the knowledge and privity of H. B. Stone is that of R. R. Stone. The Robert H. Smith, 3 F. Supp. 531; The Marguerite W., 49 F. Supp. 929, 140 F. (2d) 491; The Chickie, 54 F. Supp. 19; Eastern Steamship Co. v. Great Lakes Dredge & Dock Co. 256 Fed. 497.

"In considering the knowledge and privity of H. B. Stone we should bear in mind that the tug was hired in her home port and was to perform a service in the immediate neighborhood under the supervision of the pilot who was also furnished by H. B. Stone. This accident happened only about 1500 yards from the anchorage. In short, the tug was engaged to perform a service with which the managers of the Stone organization were, or should have been, thoroughly familiar. It was incumbent upon them to know the condition of the nearby river and the adequacy or inadequacy of the tug with which they undertook to carry the steamship safely on its way. Moreover, H. B. Stone, the general agent in charge for his father, the owner of the business, testified expressly that he told Dosher to take the tug 'Stone 6' and get the 'Severance' at her anchorage; and he actually saw these vessels pass by. This evidence clearly shows that Stone knew, or should have known, that a tug, which proved

to be inadequate, was to be used; and this constituted negligence on his part.

"In the light of these facts, considered against the background of the entire record, we feel constrained to hold, in spite of some indefinite testimony to the contrary given by H. B. Stone on cross-examination, that it was H. B. Stone rather than Captain Dosher who made the decision that the 'Severance' was to be towed by the smaller tug 'Stone 6' not by the larger tug, not by two tugs. On this point, H. B. Stone testified:

> " 'Mr. Edwards came down on November 23 and said he required tugboat service to take the ship up the River to Armour's. So *I told Captain Dosher to take No. 6 and go and give what service he could'* (Emphasis by the Court)

"Finally, in this connection, it is well settled that one seeking limitation has the burden of proving lack of privity or knowledge. *Coryell* v. *Phipps,* 317 U. S. 406, 409; *The E. Madison Hall,* 140 F. (2d) 589, 591 (C.C.A. 4), cert. denied 322 U. S. 748; Robinson on Admiralty, § 124, p. 742. The testimony of the two Stones, R. R. Stone the father, and H. B. Stone the son, does not, we feel, carry this burden. We, accordingly, hold that the privity or knowledge of H. B. Stone here attributable to R. R. Stone, is a sufficient basis for denying the petition for limitation of liability" (Opinion, 159-161).

We respectfully submit that the sound logic and correct reasoning as above quoted cannot be doubted. However, even if it be considered that the Court erred in imputing privity or knowledge to the petitioner, the primary ground upon which limitation was denied was the fact that petitioner was not a charterer of the tug.

Petitioner claimed to be a charterer of *No. 6* in an effort to bring himself within the provisions of Sec. 186 of Title 46, U. S. C. A., which is as follows:

> "The charterer of any vessel, in case he shall man, victual and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels."

Petitioner's evidence showed the tug had always been the property of his son, Thomas H. Stone (R. R. Stone, 68-69). Subsequent to the vesting of title in Thomas H. Stone, he became an incompetent, and in 1931, nine years before the accident and thirteen years before the trial, Peoples Savings Bank and Trust Company, of Wilmington, N. C., became his guardian, and was still his guardian at the time of the trial (Tate, 8). The guardian did not at any time have any knowledge that its ward owned the tug, until after the accident had occurred. It never had any knowledge of any alleged charter of the tug to petitioner at any time. Although the legal owner of the tug was an incompetent, there was never any court order approving any charter of the tug to petitioner. H. B. Stone had been guardian of the incompetent Thomas H. Stone just prior to the guardianship of Peoples Savings Bank and Trust Company, and the list of the incompetent's assets submitted to the Bank by H. B. Stone *did not show the tug as part of the assets nor include any charter on the tug therein* (Tate, 8-10).

Petitioner claimed to be a bare boat charterer of the tug from his incompetent son, but did not deny that no charter money had ever been paid, although he claimed that the agreed charter rate was $80 per month (R. R. Stone, 68-69). He did not deny that he had previously filed a libel, wherein petitioner himself had claimed to be the owner of the tug, against the tug *Pejebscot* to recover salvage, and testified that he "did not understand that it would make any difference" whether he was the owner or not (R. R. Stone, 74-75).

No one else knew anything at all about the asserted secret charter, which petitioner claimed had been in existence since 1925, and not one cent had ever been paid on the asserted $80 per month charter hire.

Petitioner has the effrontry to say, in support of this convenient and suddenly conceived "charter", that "There is no evidence of any complaint by the guardian of Thomas H. Stone about non-payment of charter hire" (Brief, p. 13). The undoubted reason for the lack of such a complaint was the guardian's conviction that the "charter" of the tug was pure fabrication.

Very little wonder, we submit, that the Court below refused to accept petitioner's unsupported testimony, in view of all the doubts cast thereon by other evidence, as to the charter of the tug. In this respect Circuit Judge Dobie said:

> "The only evidence to prove the alleged oral charter here was that of the most keenly interested party. It seems that the guardian of the incompetent owner had no knowledge (at the time of the collision) that its ward owned the tug; a former guardian had not listed the tug among the assets of the ward; no charter money ever seems to have been paid to the quardian; there is no record that any court ever approved the contract of charter. See *Uzzle* v. *Wood,* 54 N. C. 226; *Pate* v. *Kennedy,* 104 N. C. 234. And see N. C. G. S., sec. 33-2, sec. 33-20. And in a libel against the Pejepscot, 1939 A. M. C. 316, Stone made statements as to his relation to the tug 'Stone 6' quite inconsistent with his evidence in the instant case.
>
> "We accordingly feel constrained to hold that Stone was not the charterer of the tug 'Stone 6'. He was at best a mere bailee or a trustee ex maleficio. Thus he cannot claim the benefit of the Limited Liability Act" (Opinion, 159).

Petitioner has taken no exception to that language, and makes no argument in this Court that the Court below

erred in refusing to believe that he was a charterer of the tug.

The denial of limitation was based upon the rule as declared by the Third Circuit in *Jones & Laughlin* v. *Vang* (CCA 3) 73 Fed. (2d) 88, certiorari denied by this Court at 294 U. S. 735, where the Court said:

> "A charter party is a specific and, we venture to say, an express *contract by which the owner lets a vessel or some particular part thereof to another person for a specified time or use.* 58 C. J. 106; Ward v. Thompson, 63 U. S. 330, 16 L. Ed. 249; The Harvey and Henry (C.C.A.) 86 F. 656. A diligent search has failed to uncover any law on a charter party by implication. All the law available to us deals with a charter party as an *express contract,* whether written or oral. Benedict's Admiralty (4th Ed.) sec. 200. Being an express contract *it must be proved* yet may be construed like any other contract. Declining to find a charter by implication we are asked to construe the coal contract as a charter party. 24 R. C. L. pp. 1093, 1097. * * *
>
> "Failing proof of charter, we find the respondent has not brought itself within the privileges and immunities of the Limited Liability Act" (90-91) (Emphasis supplied).

So also, in the case at bar, there can be no doubt that petitioner was at most a mere bailee of the *Stone No. 6.* It was purely a gratuitous bailment, for petitioner never paid his incompetent son, or the son's guardian, any monies at all for the use of the tug.

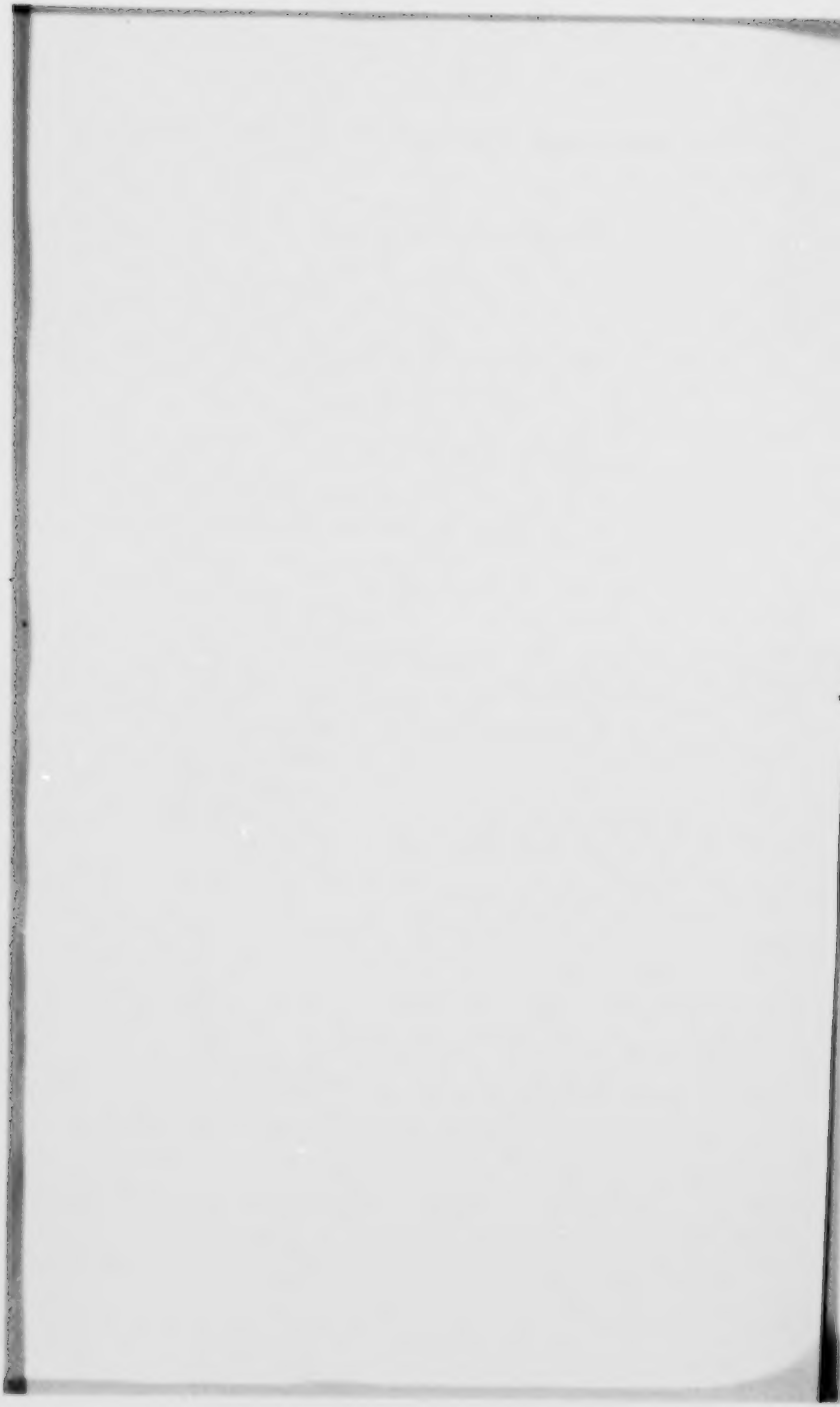
Petitioner makes no argument in this Court on the holding below denying him limitation of liability on the ground that he was not a charterer of the tug, and is apparently content with that holding. Therefore his argument on the denial of limitation by reason of the imputed privity or knowledge is, we submit, a moot question.

V. The application for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS A. MIDDLETON,
Counsel for Respondent
Texas Gulf Sulphur Company, Inc.

HILL, RIVKINS & MIDDLETON,
on the Brief.



Navassa
Cable area
marsh
Cape Fear River
Northeast Cape Fear River
Cable area
marsh
Cable area
Creek
Wagon Pt.
EAGLE ISLAND
BRUNSWICK RIVER
Alligator Creek
Redmond Creek
marsh
Cable area
TANK
TANK ON GR
STACK (TALLEST)
STACK
TANK
N.
Nunnery Park
Dram Tree Pt.